THE POWER OF MUNICIPAL CORPORATIONS TO GRANT EXCLUSIVE PRIVILEGES. —All questions relating to the municipal ownership of public utilities are of common interest. Many of them, owing to the uncertainty of the law upon the subject, are of peculiar interest to the legal profession. One of the most recent cases upon this subject is *Vicksburg* v. *Vicksburg Water Works Co.* (1906), 202 U. S. 453, 26 Sup. Ct. Rep. 660, in which the Supreme Court passes upon the question of the power of a municipal corporation to grant an exclusive privilege for a term of years without express authority from the state to that effect.

Briefly stated, the facts were as follows: The City of Vicksburg, Mississippi, with the usual general authority to supply itself and inhabitants with water and enter into contracts with reference thereto, executed a contract with the water company's assignors whereby they were to furnish the city with water for thirty years, the city agreeing as a term of the contract that the right of the water company should be exclusive. Later the city council passed an ordinance for the establishment of a municipal water plant. On the ground that the ordinance impaired the obligation of the contract, suit was brought in the federal court to enjoin the city from proceeding further. The Supreme Court disposed of the case by allowing the injunction.

MR. JUSTICE DAY in delivering the opinion says: "The question of the power of the city to exclude itself from competition is controlled in this court by the case of *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. Rep. 77." If the City of Vicksburg excluded itself from competition, it must have been by the contract. That a municipal corporation or other agent in whom is invested a portion of the governmental functions has no authority, in the absence of express power to that effect, to enter into a contract granting an exclusive privilege or monopoly is undoubtedly sustained by the weight of authority. DILLON, MUNIC. CORP., § 692, et seq; ELLIOT, MUNIC. CORP., § 85; BEACH, MUNIC. CORP., § 553, et seq., and cases cited; *Minturn* v. *Larue*, 23 How. 435; *Wright* v. *Nagle*, 101 U. S. 791; *Gale* v. *Village of Kalamazoo*, 23 Mich. 344; *Logan & Sons* v. *Pyne*, 43 Iowa 524; *Jackson County Horse R. Co.* v. *Interstate Rapid Transit Co.*, 24 Fed. Rep. 306; *Saginaw Gas Light Co.* v. *City of Saginaw*, 28 Fed. Rep. 529; *Grand Rapids E. L. & P. Co.* v. *Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. 659; *The Westerly Water Works Co.* v. *Town of Westerly*, 80 Fed. Rep. 611; *Syracuse Water Co.* v. *City of Syracuse*, 116 N. Y. 167; *Altgeld* v. *City of San Antonio*, 81 Tex. 436; *Long* v. *City of Duluth*, 49 Minn. 280; *Davenport* v. *Kleinschmidt*, 6 Mont. 502; *City of Chicago* v. *Rumpff*, 45 Ill. 90. (See particularly opinion of COOLEY, J., in *Gale* v. *Kalamazoo.*) Logically and in reason the result should be so. It has been held repeatedly that the legislature itself when acting directly cannot grant an exclusive privilege by implication, but only by the clearest express terms to that effect. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 422. While if a city acting under only general powers, such as the City of Vicksburg had, can grant an exclusive privilege it is possible for the state acting through its agent, the city, to grant such a privilege by implication, since the authority from the state does not expressly give such power and the city has power to do that only which it is authorized to do. Thus the state does indirectly that

which it cannot do directly. Such power would have to be expressly granted, as it is neither incidental nor necessarily implied in order to carry out those powers that are granted. DILLON, MUNIC. CORP., § 89, and cases cited above. If the city had no authority to enter into such a contract, it is ultra vires and void. DILLON, MUNIC. CORP., §§ 447, 457, 935, et seq., and cases cited therein. See *Illinois Trust and Sav. Bank* v. *Arkansas City*, 76 Fed. 271, 34 L. R. A. 518, in which the court held that the part of the contract relating to exclusiveness was ultra vires and void. So the City of Vicksburg was not bound not to enter into competition, the void contract being equivalent to no contract at all.

Does the decision in the *Walla Walla* case support that of the principal case? In the principal case the part of the contract relating to the exclusive right was: "the exclusive right and privilege is hereby granted for the period of thirty years." *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65, 22 Sup. Ct. Rep. 585. In the *Walla Walla* case the corresponding part of the contract was: "The City of Walla Walla shall not erect, maintain, or become interested in any water works except the ones herein referred to, etc." If any words are sufficient to create an exclusive right, those used in the principal case would. (See opinion, p. 471.) While in the *Walla Walla* case the right granted clearly was not exclusive, for it was the city alone that was prohibited by the contract from erecting a water plant, there being nothing whatever in the contract to prevent a franchise being given to another individual or company. See *North Springs Water Co.* v. *Tacoma*, 21 Wash. 535, 58 Pac. 773. That MR. JUSTICE BROWN who delivered the opinion in the *Walla Walla* case recognized this distinction, and did not consider the contract there exclusive, is apparent from the following extracts from the opinion: On page 14 he says "Had the privilege granted been an exclusive one, the contract might have been considered objectionable, upon the ground that it created a monopoly without an express sanction from the legislature to that effect." On page 15 he says: "An ordinance granting a right to a water company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water does not, in our opinion, create a monopoly, or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with the further stipulation that the city shall not erect water works of its own, etc." Again on page 18 he says: "Cases are not infrequent when under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power, to make a particular contract can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard to the rights of the other party." The court here cites a number of cases in support of this proposition, all of which sustain the proposition that a city cannot make such an exclusive contract without express authority. It will readily be seen that the distinction between the two cases is that in the one the contract forbidding the city from entering into com-

petition is void, while in the other it is valid. In the principal case it is as though there were no contract at all forbidding competition, while in the *Walla Walla* case there was a valid subsisting contract preventing the city from competing. That it is impossible for a city, in the absence of express authority to contract away its duty to furnish water, light, etc., for a term of years, even when the contract so provides, there being no question involved as to the validity of the contract on the ground of creating a monopoly, is not without the support of authority. ELLIOT, MUNIC. CORP., § 148; DILLON, MUNIC. CORP., § 97, and cases cited.

In order to reach the conclusion, therefore, which it did the Supreme Court must have considered it within the powers of the city to grant an exclusive privilege without having such authority expressly given by the state. This, as has been shown, is contrary to the decisions of the same court in *Wright* v. *Nagle,* 101 U. S. 791, and *Minturn* v. *Larue,* 23 How. 435, and, it seems, contrary to the weight of authority in the state courts. R. W. A.

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INHERITANCE TAXES AND THE RIGHT TO TRANSFER AND INHERIT PROPERTY. — In 1903 the legislature of Wisconsin passed a law similar to those found in many of the states which provided for a tax upon the devolution of property upon the death of the owner. The law makes certain exemptions, and is progressive, increasing with the amount and with the remoteness or absence of relationship to the deceased. The constitutionality of this law has just been sustained by the Supreme Court of Wisconsin. CASSODAY, C. J. and DODGE, J., dissenting. *Nunnemacher* v. *State,* 108 N. W. Rep. 627.

The constitutionality of the law was attacked on three grounds. First, that the right to take property by will or descent is a natural right which can not be taken away nor substantially impaired by the legislature. Second, that under the Constitution only property can be taxed. Third, that this tax violated the constitutional requirement of uniformity.

The court says that the right to take property by will or descent is a natural right and not a privilege created by law and subject to the legislative pleasure, and it is because of this conclusion the case possesses peculiar interest.

That this is new doctrine cannot well be denied and we know of no cases to sustain it. The court certainly cites none and recognizes that its view is opposed to all the decided cases, but quotes with approval a dictum of JUSTICE FIELD in *Minot* v. *Winthrop,* 162 Mass. 113. Similar support might have been found in an expression in the opinion of MR. JUSTICE WHITE in *Knowlton* v. *Moore,* 178 U. S. 41. The court also asserts that it is sustained by the Athenian Law, the laws of the Twelve Tables in Rome and also by the law in England prior to the Norman conquest, and that the formation of constitutional governments which recognized certain "inalienable rights" established the ownership of property upon a foundation which makes it impossible for the legislature to destroy or substantially impair the right to will property or to receive property by will or through intestate succession.